

Reproduced with permission from Daily Environment Report, 36 DEN A-16, 2/24/16. Copyright © 2016 by The Bureau of National Affairs, Inc. (800-372-1033) <http://www.bna.com>

Chemicals

Ability to Ban Asbestos Is Litmus Test For Amended TSCA, Health Advocates Say

Legislation to amend the Toxic Substances Control Act must ensure that the Environmental Protection Agency can ban asbestos, the president of a public health advocacy organization said Feb. 23.

“Why would you ever pass a bill that doesn’t ban asbestos?” Linda Reinstein, president of the Asbestos Disease Awareness Organization, told more than 50 Senate staffers representing 30 senatorial offices. Reinstein spoke during the organization’s ninth congressional staff briefing.

The inability of the EPA to ban asbestos has become for many people, including legislators, a symbol of the failure of TSCA, which President Gerald Ford (R) signed into law in 1976.

The agency sought to phase in a ban on the manufacture and nearly all uses of asbestos through a 1989 regulation it issued (54 Fed. Reg. 29,460).

However, the U.S. Court of Appeals, Fifth Circuit overturned that rule in 1991 on two main points.

The agency had not proven its regulation would be—as TSCA requires—the least burdensome option, nor had the agency proven that the rule was promulgated on the basis of substantial evidence, it said (*Corrosion Proof Fittings v. EPA*, 947 F.2d 1201, 33 ERC 1961 (5th Cir. 1991)).

Ongoing Deaths, Ongoing Imports. Twenty-five years after that decision, 40 U.S. residents die each day from asbestos-related diseases including lung cancer and mesothelioma, Reinstein said. The inability to regulate asbestos slowed EPA efforts to control other chemicals because of the precedent set in the Corrosion Proof Fittings case.

Asbestos consumption in the U.S. was estimated, based on imports, to be at least 400 metric tons (881,849 pounds) in 2014, according to a Mineral Commodity

Summary the U.S. Geological Survey published in January 2015.

“The chloralkali industry accounted for an estimated 88 percent of U.S. consumption. The remainder was used in coatings and compounds, plastics, roofing products, and unknown applications,” USGS said.

Julia Gundlach, who was diagnosed 10 years ago with an abdominal form of cancer called peritoneal mesothelioma, spoke at the Asbestos Disease Awareness Organization’s briefing and said more than 50 other countries have banned asbestos.

Canada and the United States are among the few Western countries that still allow asbestos to be imported, she said.

Both Bills Allow, But Don’t Require, Controls. Neither the House’s TSCA Modernization Act (H.R. 2576) nor the Senate’s Frank R. Lautenberg Chemical Safety for the 21st Century Act (S. Admt. 2932 to H.R. 2576), require the EPA to review or regulate asbestos, although both give the agency discretion to do so, Reinstein told Bloomberg BNA. That is a concern for her organization.

“If it’s not mandated, it’s discretionary and there’s no guarantee,” Reinstein said.

An aide to Sen. Barbara Boxer (D-Calif.) discussed with Bloomberg BNA language the aide said Boxer added to the Senate bill to increase the chance that EPA would review and, as necessary, regulate asbestos quickly under an amended TSCA.

As the EPA would create its first list of chemicals slated for assessment and possible regulation, the Senate bill would require the agency to designate at least 10 high- and 10 low-priority substances.

Of the 10 high-priority substances, at least five chemicals would be drawn from the agency’s October 2014 “TSCA Work Plan” list, which includes asbestos.

The expectation is that asbestos would be a high-priority chemical, Boxer’s aide said.

The test of whether an amended TSCA will allow the EPA to manage chemicals as needed would come later in the process, Boxer’s aide said.

Judicial Standard Remains the Same. EPA regulations are typically litigated, the aide said. The key test of a new “TSCA” would be whether the EPA would win when an asbestos ban, or other regulatory action, was challenged, the aide said.

Both the House and Senate bills amending TSCA would remove the requirement that EPA’s regulation restricting or banning chemicals be the least burdensome option.

Neither the House nor Senate bill would alter the law’s judicial standard, the aide said.

The judicial standard for review used in most environmental statutes is the Administrative Procedures Act standard of “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”

TSCA, however, uses a standard that requires the agency to achieve a more stringent judicial standard by requiring it to have “substantial evidence” supporting its chemical regulations.

The House and Senate continue to discuss merging their respective TSCA reform bills, and the Asbestos Disease Awareness Organization is meeting with different offices to discuss its concerns with TSCA and other legislation that addresses asbestos, Reinstein said during her presentation.

Status of Effort to Merge Bills. Separately, Sen. James Inhofe (R-Oka.) told Bloomberg BNA that while discussions continue, he is frustrated at the pace of House efforts.

“There has just never been the passion in the House for the chemical bill that there has been in the Senate, and I don’t understand why,” Inhofe said.

Overhauling TSCA, is “a big deal,” Inhofe said.

Ironically, few ordinary Americans understand that, he said.

A former senior scientist at the EPA recently voiced a similar view on the value of and lack of knowledge about TSCA.

“The federal law governing chemicals used in commerce in the United States affects every person and

business, but few are aware of its importance to their lives or that it is outdated and in serious need of modernization,” wrote William Farland in a Society of Toxicology blog “TSCA: A Step Closer to Reform.” Farland has served on an SOT task force advising legislators on scientific questions involved with TSCA reform.

Sen. Tom Udall (D-N.M.) was more upbeat as he described the state of House and Senate TSCA-reform negotiations to reporters Feb. 23.

A key House aide was unavoidably absent, but has now returned, Udall said.

“We’re trying to get the staff working with each other. I’ve been on the phone a lot with Democratic and Republican members. The whole objective here is to get people working on the changes that were made on both sides—not necessarily start from one perspective or the other,” Udall said.

Hope and Confidence. House and Senate legislators are still working to complete a TSCA reform bill before summer, he said.

The Supreme Court vacancy, Flint water, and Zika virus crises are taking time, Udall acknowledged. “There’s always a lot to do around here, but from the leadership down people want this done on both sides. So I think we’re going to get it done.”

The Senate bill would revise many more aspects of TSCA than would the House bill. Consequently, Udall said, House members need time to get familiar with new issues, he said.

No decision has been made as to whether the two chambers will eventually meet in a formal conference, Udall said. “First let’s try to work out the differences, then we’ll see what the best way to do it is.”

BY PAT RIZZUTO

With assistance from Anthony Adragna and Ari Natter in Washington.

To contact the reporter on this story: Pat Rizzuto in Washington at prizzuto@bna.com

To contact the editor responsible for this story: Larry Pearl at lpearl@bna.com